ARIZONA COURT OF APPEALS

DIVISION TWO

RUSSELL R. SHOLES and MARY L. SHOLES, husband and wife; Appellants, v. JUDY FERNANDO-SHOLES, Appellee.	2 CA-CV 2011-0060 Pima County Superior Court Case No. CV2010-5162

APPELLEE JUDY FERNANDO'S ANSWERING BRIEF

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I. INTRODUCTION

¶1. As the trial court correctly found, the claims which Appellants Russell and Mary Sholes ("Sholes") brought against Appellee Judy Fernando ("Judy") in this case are untimely and, in fact, were previously decided in another case. Just like the Sholes' underlying Complaint ("*Clone Complaint"*), this appeal is frivolous and is nothing more than another attempt by the Sholes to assist their disbarred son, Bruce Sholes ("Bruce"), in harassing Judy, Bruce's soon-to-be ex-wife.[1]

¶2. The trial court was correct in dismissing each and every one of the Sholes' claims against Judy. Every claim asserted in the *Clone Complaint* is barred by the statute of limitations, *res judicata,* and collateral estoppel.

¶3. First, the statute of limitations for an oral debt is three years.[2] *A.R.S. §12-543.* Based on the Sholes' own pleading, the alleged oral debt they are attempting to sue over accrued in March of 2006 (or at the very latest, when the Sholes filed their initial lawsuit in Maricopa County, CV 2006-051204, in May 2006). Their *Clone Complaint* was filed in June of 2010. Thus their claims, all of which flow from this alleged oral agreement, are time barred.

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[1] Judy Fernando filed for divorce from Bruce Sholes in May 2006 (D2006-2053). The divorce case is set to begin trial on August 31, 2011.

[2] The other claims the Sholes assert all have a two-year statute of limitations.

¶4. Next, each of the Sholes' claims against Judy have already been filed, litigated and adjudicated to a final judgment on the merits. In 2006, the Sholes filed a lawsuit in Maricopa County Superior Court (CV 2006-051204 - the "*Maricopa Case*") based on the exact same facts they alleged in this case. In the *Maricopa Case*, the Sholes claimed that Judy breached an oral agreement with them by failing to repay money they allegedly loaned to her. In that case, the Sholes asserted that Judy, and Judy alone, owed them money based on an alleged oral contract, despite the fact that Judy was married to Bruce at the time the alleged contract was formed. While the Sholes did sue Bruce in the *Maricopa Case*, they made no claim that he owed them any money. In fact, it appears that they only sued Bruce so he could file a cross-claim against Judy.

¶5. On December 9, 2009, in the *Maricopa Case*, the jury determined that Judy was not obligated to the Sholes for the exact same alleged oral debt they have sued her for in this case. The jury also found for Judy on the exact same unjust enrichment and promissory estoppel claims the Sholes are now attempting to bring again. As the trial court in this case found:

> [u]nder the 'same evidence' test cited in the applicable case law, there are no differences between this case and the Maricopa County case except the Plaintiffs now claim the debt is community, when they previously claimed it was Judy's alone.

(Emphasis in original.) (ROA 23, p. 4)[3]

¶6. The Sholes do not get to relitigate these claims now because they are unhappy with the prior outcome. They had their day in court and they lost. To allow them to file the exact same claims against Judy, whether in her sole and separate or marital capacity, would defeat the purpose of *res judicata* and collateral estoppel, long-standing doctrines that are meant to prevent parties from wasting judicial resources and from harassing former litigants.

¶7. Based on this, the Court should affirm the judgment below that the statute of limitations expired on the Sholes' claims, the time for filing of which was not tolled. The trial court's conclusion that the Sholes' claims are barred by *res judicata* and collateral estoppel should also be affirmed. Finally, this Court should award Judy her attorney's fees and costs for having to respond to the Sholes' frivolous appeal.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

¶8. On review from a trial court order granting a motion to dismiss for failure to state a claim, this Court views the facts alleged in the Complaint as true. *Riddle v. Ariz. Oncology Servs., Inc.*, 186 Ariz. 464, 465, 924 P.2d 468, 469 (App. 1996). Nonetheless, Judy objects to the Sholes' recitation of alleged facts. The

[3] For purposes of this appeal, Appellee will cite to the Record on Appeal as "ROA" followed by the document number.

Sholes go to great depths to describe a fantasy reality they created to try to screen the Court from the actual history of their claims.

¶9. The Sholes' comments accusing Judy of sandbagging, litigation by ambush, manipulation, injustice, false representations, forgery, gold digging, etc., are misplaced. These emotional and angry rants by disgruntled Appellants are false, are immaterial, have nothing to do with the judgment on appeal, and have no legal basis or support. Instead, in their Opening Brief, the Sholes simply recite paragraph after paragraph of facts they cannot support with the existing record. Because the Sholes' statement of facts fails to properly cite to the record on appeal, this Court should strike the Sholes' "Statement of Case" and the following portions of their "Statement of Facts": ¶¶ 3, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20 (starting with "Judge Ballinger), 22, 23, 24, 25, 26, 27, 29, and 30. None of the statements in these paragraphs is supported by the record on appeal.

¶10. Viewing the facts in the light most favorable to the Sholes, *Riddle*, establishes that in May of 2005, they loaned $222,000 to someone by way of an oral agreement. (ROA 2 at ¶¶ 18-19.) The loan agreement included certain terms such as an interest rate. (*Id.* at ¶ 20.) The loan was required to be repaid or secured against real property by March 2006. (*Id.* at ¶ 22.) On May 3, 2006, the Sholes filed a complaint (the "*2006 Complaint*.") in Maricopa County Superior Court , Case CV 2006-051204, identifying Judy as the borrower and alleging that

she was in default. (ROA 6, pp. 14-26.) Although Judy was married to Bruce at all times material to the alleged loan, the *2006 Complaint* did not claim that he owed the Sholes any money. (*Id.*) In fact, the Sholes specifically claimed that Judy was the only person that owed them money from the alleged loan they made to her in 2005. (*Id.* at p. 17, ¶ 16.)

¶11. The *2006 Complaint* brought claims for equitable lien and/or specific performance and lien foreclosure arising out of the alleged May 2005 oral agreement between the Sholes and Judy. (*Id.* at pp. 21-25.) In response, Judy filed a *Counter-Claim* against the Sholes for an illegal *lis pendens* placed on her sole and separate Scottsdale House by the Sholes in connection with their *2006 Complaint*. (*Id.* at pp. 44-46; ROA 17, pp. 32-42.)

¶12. On October 7, 2008, the Sholes amended their *2006 Complaint* (*"Amended 2006 Complaint"*), adding claims only against Judy for breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment, and promissory estoppel – all arising out of the same alleged transaction. (ROA 6, pp. 28-42.) On December 15, 2008, Judy was granted summary judgment on all of the claims contained in the Sholes' original *2006 Complaint*, as well as on her *Counter-Claim* against them for wrongful *lis pendens*. (*Id.* at pp. 44-56.) The remaining claims contained in the Sholes' *Amended 2006 Complaint* proceeded to trial in December 2009.

¶13. The alleged oral agreement that was the basis for the Sholes' *2006 Complaint, Amended 2006 Complaint* and their current *Clone Complaint*, arose from what the Sholes describe as a $222,000 loan between them and Judy, supposedly made to stave off foreclosure on Judy's Scottsdale House. (ROA 2; ROA 6, pp. 14-42.) In their *2006 Complaint, Amended 2006 Complaint* and their current *Clone Complaint*, the Sholes allege that Judy agreed that if her Scottsdale House did not sell within nine months (approximately by the end of March, 2009), then she would pledge a promissory note evidencing her indebtedness to the Sholes, along with a deed of trust that would encumber her Scottsdale House. (*Id.*) Again, all of the factual allegations supporting the Sholes' *2006 Complaint* and *Amended 2006 Complaint* are the exact same factual allegations they now assert in support of their current *Clone Complaint*. (*Id.*)

¶14. The *Maricopa Case* proceeded to trial in December 2009. (ROA 6, pp. 58-71.) Judy's position at trial was that Bruce sold an annuity to his parents when he was trying to hide income during the divorce from his second wife. (ROA 12, pp. 17-29.) When the annuity paid a lump sum in June 2005, instead of transferring the money to his parents, Bruce refused to pay them the money they were entitled to. (*Id.*) This, however, was not the money used to pay off the mortgage on Judy's Scottsdale House. (*Id.*) That money was community money and **NOT** the annuity money. (*Id.*) In the *Maricopa Case*, the Sholes were

required to prove that the annuity money was used to pay off the mortgages on Judy's Scottsdale House in order to establish their claims. (*Id.*) They failed to do so. (*Id.*) "The truth is that Bruce Sholes, and Bruce Sholes alone, sold his parents an annuity and promised to pay them the proceeds of that. He breached that agreement. He did not [pay the Sholes] when [the annuity] came due." (ROA 12, p. 21.) In other words, Judy's position in the *Maricopa Case* was that she did not borrow any money from the Sholes, that Bruce (and only Bruce) owed annuity money to his parents and that money did not pay off the mortgages on her Scottsdale House.[4] (*Id.* at pp. 17-29.)

¶15. On December 9, 2009, a Maricopa County jury returned a unanimous verdict in favor of Judy on all of the remaining claims contained in the Sholes' *Amended 2006 Complaint.* (ROA 6, pp. 58-71.) Following the trial, the court awarded Judy her attorney's fees. (*Id.* at pp. 73-74.) The Sholes never appealed the final judgment entered in the *Maricopa Case.*

¶16. Then in June 2010, the Sholes filed their *Clone Complaint* which was virtually identical to their *Amended 2006 Complaint*. (ROA 2; ROA 6, pp. 28-42.)[5]

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[4] The Sholes' repeated claims that Judy's trial counsel argued "thirty (30) times" during closing in the *Maricopa Case* that their loan to Judy was a "community debt" is false and not supported by the record. Judy's position was always that there was NO loan; that is what counsel argued to the jury. (ROA 12, pp. 18-24.)

[5] In fact, the Sholes simply copied their *Amended 2006 Complaint* and changed two paragraphs. This is illustrated by the fact that the *Clone Complaint* alleges that

As the trial court noted, the principal substantive difference between the Sholes' *Amended 2006 Complaint* and their *Clone Complaint* was that they now claimed Judy AND Bruce borrowed the money via an oral agreement that allegedly occurred in May of 2005. (ROA 2.) In responding to his parents' *Clone Complaint*, Bruce admitted that he borrowed the annuity money from them in July 2005 after repeatedly denying that he did in the *Maricopa Case*. (ROA 13.)

¶17. Judy filed a motion to dismiss the *Clone Complaint*. (ROA 6.) The parties filed numerous documents in support of their respective positions and made many other references to evidence outside the pleadings. (ROA 6, 12, 17 and 20.) At the hearing on Judy's motion, the parties stipulated that the trial court could treat the motion as one for summary judgment. (ROA 22.) After the hearing, the trial court granted Judy's motion, dismissed the claims against her, and awarded her attorney's fees. (ROA 23, 48.) In reaching its decision, the trial court found that the Sholes had unclean hands and had not acted properly in filing their *2006 Complaint* and *Clone Complaint*. (ROA 23, p. 4.) The trial court found that the Sholes' "conduct and claims have the appearance/inference of parents helping their son in posturing during his divorce proceedings with Judy." (*Id.*)

¶18. The Sholes filed a motion for reconsideration and a motion for new trial, both of which were denied. (ROA 27, 38, 47, 49, 57.) This appeal followed.

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venue, personal jurisdiction and subject matter jurisdiction are all proper in "Maricopa County Superior Court." (ROA 2, ¶ 7-9.)

(ROA 59.) Of note, the trial court record shows that despite the fact that Bruce admitted in this case to incurring the debt the Sholes claimed, the Sholes have done nothing to reduce that admission to a judgment. (ROA 13, p.1; ROA 57, p. 1.) Thus, despite the Sholes' attempts to garner sympathy from this Court, they have done little to enforce the debt against a party wriggling on the hook of their *Clone Complaint*.

III. STATEMENT OF THE ISSUES

¶19. Was the Sholes' *Clone Complaint* barred by the statute of limitations when the Sholes failed to provide any evidence in support of their various and sundry tolling claims?

¶20. Did the Maricopa County jury's verdict -- finding that Judy was not liable for the exact same claims the Sholes allege in their *Clone Complaint* -- bar the Sholes from relitigating those exact claims?

¶21. Should this Court award Judy her reasonable attorney's fees?

IV. STANDARD OF REVIEW

¶22. Whether an appeal from a motion to dismiss or from a grant of summary judgment, this Court conducts a *de novo* review of a trial court's judgment dismissing a case, based on its application of a statute of limitations. *Dube v. Likins*, 216 Ariz. 406, ¶ 5, 167 P.3d 93, 98 (App. 2007). As always, questions of law are subject to *de novo* review. *Hall v. Lalli*, 194 Ariz. 54, ¶ 5, 977

P.2d 776, 779 (1999); *National Bank of Ariz. v. Thruston*, 218 Ariz. 112, 180 P.3d 977 (App, 2008). But a trial court's decision that a party presents an insufficient bases to equitably toll a matter will not be reversed absent an abuse of the trial court's discretion. *McCloud v. Ariz. Dept. of Public Safety*, 217 Ariz. 82, ¶¶ 10 and 17, 170 P.3d 691, 698 (App. 2007).

ARGUMENT

V. PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

¶23. The Sholes raise myriad claims trying to circumvent the applicable statute of limitations. Neither their repeatedly false claims about the nature of their action, the contract on which they filed suit, or their absurd positions regarding tolling gets them around the applicable statute. As such, the Sholes' *Clone Complaint* is barred by the 3-year statute of limitations and this Court should affirm.

A. PLAINTIFFS' CLONE COMPLAINT WAS NOT TIMELY FILED

¶24. An applicable statute of limitations begins to run at the time when one person may sue another. *Healey v. Coury*, 162 Ariz. 349, 354, 783 P.2d 795, 800 (App. 1989). If a preceding condition must be fulfilled before an obligation becomes due, the statute of limitations begins to run when that preceding condition is met. *Est. of Page v. Litzenburg*, 177 Ariz. 84, 90, 865 P.2d 128, 134 (App.

1993). A defendant asserting that a claim is barred bears the burden of proving that a claim falls within a specific statute of limitations. *Kiley v. Jennings, Strouss & Salmon*, 187 Ariz. 136, 139, 927 P.2d 796, 799 (App. 1996). Once a defendant makes a *prima facie* case that a claim is subject to an applicable statute of limitations, the burden shifts to the plaintiff to move forward. *Id.*

¶25. Plaintiffs' claims here are based on a "verbal agreement, whereby the Sholes agreed to loan [Judy] and her husband (their son) Bruce Sholes $222,000.00." (ROA 2 at ¶ 19.) Pursuant to A.R.S. § 12-543, an action on indebtedness evidenced only by a verbal contract must be filed within three years of a breach.

¶26. Under any interpretation of the allegations raised in the Sholes' *Clone Complaint*, the statute of limitations began to run on their claims by the end of March 2006. (ROA 2, ¶ 22.) The Sholes obviously had the ability to timely file an action to enforce their claims, knew their rights regarding the alleged debt, and had the wherewithal to file. After all, they filed their *2006 Complaint* against Judy in May 2006, alleging a breach of this same "verbal agreement." (ROA 6, p. 17.)

¶27. The same filing is also an admission that the Sholes discovered their alleged claims prior to May 2006. Whether the breach or discovery date was March 2006, as they allege in their *Clone Complaint*, or a month later is immaterial under the circumstances of this case. Pursuant to A.R.S. § 12-543, the Sholes were

required to file their claims arising out of their alleged verbal agreement by May 2009. And while they may have filed their baseless *2006 Complaint* timely, they did not file this lawsuit alleging breach of the same oral contract until June 2010. Thus, the *Clone Complaint* is more than a year too late. *A.R.S. § 12-543*.

¶28. The Sholes allege among other things that their claim is actually governed by some ethereal statute of limitations governing "demand notes" or for specific performance. (Opening Brief at 21.) Although courts will often apply the longer of two applicable limitations periods, such a request must be based on an actual statute of limitations. Despite having raised the same argument multiple times in the trial court, the Sholes have never been able to point to a specific statute setting a different limitations period for "demand notes." (ROA 12 at 11; ROA 27 at 7.) Neither can the Sholes point to any "note," as they specifically allege that the debt was created through a verbal agreement. (ROA 2.) The Sholes also fail to acknowledge that the filing of their *2006 Complaint* constituted a demand for repayment.

¶29. Moreover, even if the Sholes had pleaded a claim requesting that the trial court order Judy to encumber her property, (which they did not), the Sholes filed their *Clone Complaint* too late for any four-year limitation period. *A.R.S. §12-546.* (ROA 2, pp. 10-11 (the *Clone Complaint* requests only damages for the alleged breach).) The bottom line is the claims the Sholes raise in their *Clone*

Complaint were filed too late because they were not brought within three years of the alleged breach.

B. THE APPLICABLE STATUTE OF LIMITATIONS WAS NOT TOLLED

¶30. A party raising a tolling claim "bears the burden of proving the statute has been tolled." *Anson v. Am. Motors Corp.*, 155 Ariz. 420, 421, 747 P.2d 581, 582 (App. 1987). As the trial court found, the Sholes' tolling arguments are meritless. (ROA 23, pp. 3-4.) Because there was no basis to toll the limitations period, the Court should affirm.

1. The Filing of The Sholes' *2006 Complaint* Did Not Toll The Statute of Limitations

¶31. The Sholes contend that the statute of limitations was tolled by the filing of their *2006 Complaint*. The Sholes claim that the first lawsuit fulfilled all of the purposes of the statute of limitations, and that the limitations period accordingly should be tolled. As the trial court found, no authority supports the Sholes' position. (ROA 23, p. 3.)

¶32. This is not a case where the Sholes were required to exhaust an administrative remedy. *See Third & Catalina v. City of Phoenix*, 182 Ariz. 203, 895 P.2d 115 (App. 1995). Neither is this a case where a prior suit established a right that the Sholes are now trying to enforce. *See City of Phoenix v. Sittenfeld*, 53 Ariz. 240, 88 P.2d 83 (1939) (laid off police officer established right to back

pay in first law suit that could be enforced in second suit filed within one year of trial court's judgment awarding back pay, despite the fact that second enforcement action was not filed within one year of officer's discharge). Nor is this a case about whether the date important under the statute of limitations is the date the action is filed or the date a summons is issued. *See Gideon v. St. Charles*, 16 Ariz. 435, 146 P. 925 (1915).

¶33. Additionally, litigation over the Sholes' *2006 Complaint* did not establish that the underlying debt was a community obligation. Instead, the jury returned a verdict agreeing with Judy that she did not breach an oral agreement with the Sholes and therefore was not responsible for the claimed debt. Thus, the only permissible construction of the jury's verdict is that Judy does not owe the Sholes any debt, community or otherwise.

¶34. Given the lack of authority supporting the Sholes' claims, the only law the Court is left with is the plain language of A.R.S. § 12-543, which on its face requires that the action in dispute be timely filed. Unlike in criminal law, civil law has no statute by which a plaintiff can resurrect an otherwise stale claim. *See A.R.S. § 13-107(G)*. The fact that the legislature knew how to create such a "savings" statute but failed to do so here merely reinforces the fact that public policy favors adherence to the plain text of statutes of limitation where a plaintiff raises no countervailing public policy, as the Sholes have failed to do here.

¶35. The Sholes chose to file suit against Judy in 2006 claiming she (not Bruce) was solely responsible for the alleged debt. They did this because they were completely preoccupied by vengeance and blind adherence to their son's lost cause.

¶36. In fact, a prior filing on the same action weighs heavily against tolling the limitations period. Where a party's statements in prior litigation show that it was acutely aware of its rights and its alleged damages, courts are reluctant to extend rights beyond prescribed limitations periods. *Arizona Dept. of Water Resources v. Rail N Ranch Corp.*, 156 Ariz. 363, 364, 752 P.2d 16, 17 (App. 1987). Here, the Sholes' actions clearly demonstrate that they knew they had a claim for damages because they timely filed their *2006 Complaint*. They simply did not like the result they got, and want a mulligan. Well, Arizona Law does not allow mulligans.

2. The Three-Year Statute of Limitations Period Was Not Equitably Tolled

¶37. The requirement that the Sholes timely file their claims was not equitably tolled. Under the doctrine of equitable tolling, a party may occasionally be excused for filing an untimely lawsuit. Equitable tolling may be based on the theory that extraordinary circumstances prevented plaintiffs from filing a timely claim or on the theory that a defendant fraudulently concealed an injury. *See*

McCloud; *Jackson v. American Credit Bureau, Inc.*, 23 Ariz. App. 199, 202, 531 P.2d 932, 935 (1975). The Sholes seem to allege both bases here.

¶38. To establish either equitable tolling claim, the Sholes were required to support their "allegations with evidence; [the party claiming tolling] cannot rely solely on personal conclusions or assessments." *McCloud*, 217 Ariz. at 87, ¶ 13, 170 P.3d at 696, *quoting Collins v. Artus*, 496 F. Supp. 2d 305, 313 (S.D.N.Y. 2007).

¶39. To prevail on their claim that extraordinary circumstances prevented them from timely filing their claim, the Sholes had to demonstrate that "they [were] prevented from filing in a timely manner due to sufficiently inequitable circumstances." *McCloud*, 217 Ariz. at 87 ¶ 11, 170 P.3d at 696, *quoting Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 240 (3d Cir.1999). Further, to prevail on such a claim, the Sholes must demonstrate that "extraordinary circumstances beyond [their] control made it impossible" for them to bring their claims on time. *McCloud*, 217 Ariz. at 89, ¶ 13, 170 P.3d at 698, *quoting Alvarez-Machain vs. U.S.*, 107 F.3d 696, 701 (9th Cir. 1996). But the uncontroverted facts show that in the *Maricopa Case*, the Sholes spent three and a half years litigating the same claims they refiled here. The Sholes tried the *Maricopa Case* to a jury which determined that Judy was not liable for a breach of an oral contract to

borrow money or for any of the other remaining claims contained in the Sholes' *Amended 2006 Complaint*.

¶40. A "plaintiff's *pro se* status has been an important factor in many of the above cases that have applied equitable tolling," *Kyles v. Contractors/ Engineers Supply, Inc.*, 190 Ariz. 403, 406, 949 P.2d 63, 66 (App. 1997). However, the Sholes were represented by counsel from the time they filed their *2006 Complaint* through February 2010 when judgment was entered against them. (ROA 6, pp. 14-74.) The Sholes brought their claims timely against Judy in the *Maricopa Case*. They lost. Thus, there were no "extraordinary circumstances beyond [their] control" that made it impossible for the Sholes to file their *Clone Complaint* on time. The facts of this case do not warrant a tolling of the statute of limitations, and the trial court did not abuse its discretion in so ruling. *McCloud,* 217 Ariz. at 89, ¶ 19; 170 P.3d at 698.

¶41. Neither did the Sholes present any evidence that Judy concealed any claim. "There must be some positive act of concealment done to prevent detection" of a party's injury to claim equitable tolling by misconduct. *Jackson v. American Credit Bureau, Inc.*, 23 Ariz. App. 199, 202, 531 P.2d 932, 935 (App. 1975). Such circumstances are far from what happened here. Judy always claimed that she did not enter into an oral contract with the Sholes to borrow any money. In this case, the trial court found:

> … there are no facts upon which an equitable tolling defense is presented.
>
> Mr. and Mrs. Sholes (assuming their facts to be true), made a loan to Judy (or Judy and Bruce) during the time they were married. Those facts were not concealed (in fact, it was alleged in the Maricopa County Complaint). The loan, then, was either:
>
> 1. Judy's sole and separate obligation, because it was used for the benefit of her sole and separate property; or
>
> 2. A community obligation; or
>
> 3. A sole and separate debt for Bruce.
>
> Judy did not hide this 'defense'… .

(ROA 23, pp. 3-4.) As the trial court correctly concluded, the Sholes were not 'sandbagged' in the *Maricopa Case*. (*Id.*)

¶42. The undisputed evidence is that the Sholes filed a claim against Judy in May 2006 based on breach of an alleged oral contract. Despite the fact that Judy was married to Bruce at that time, the Sholes went out of their way to make sure that they did not seek damages against him (they even named Bruce as a defendant, but only so he could file a cross-claim against Judy). Instead, the Sholes claimed that they entered into an oral agreement with only Judy.

¶43. Judy said from day one in the *Maricopa Case* that she did not borrow any money from the Sholes. (ROA 17, pp. 16-26 and 32-42.) The money the Sholes claim they loaned Judy was money their son owed them from an annuity he

sold them. (*Id.*) Judy always maintained that community funds were used to pay off the mortgages on her Scottsdale House and not the annuity money Bruce owed his parents. (*Id.*) The Sholes knew this from the very beginning of the *Maricopa Case.* (*Id.*)

¶44. If from the beginning of the *Maricopa Case* the Sholes were not on notice of Judy's defense, then they surely were by May 2008. In May 2008, Judy filed a Motion for Summary Judgment ("*MSJ"*) against the Sholes in the *Maricopa Case,* claiming that she paid off the mortgages on her sole and separate Scottsdale House "using community funds." (ROA 17, p. 37.) In addition to the open and obvious relationship between Judy and Bruce, the Sholes specifically were on notice prior to the statute of limitations running of Judy's claim that community funds paid off the mortgages on her sole and separate house; funds that had absolutely nothing to do with the Sholes or the annuity money they were due from their son. In fact, the Sholes amended their *2006 Complaint* after Judy's *MSJ* was filed and failed to add Bruce to their new claims. (ROA 6, pp. 28-42.)

¶45. Moreover, Mary Sholes repeatedly testified under oath in the *Maricopa Case* that the alleged loan was made to Judy and Judy alone "not to Bruce." Specifically, Mary testified that Bruce "doesn't owe [her] anything";

"[t]his is Judy's debt." (ROA 17, pp. 29-30.)[6] The Sholes then intentionally litigated the claims against Judy in the *Maricopa Case* despite notice to them that they potentially needed to file the same claims against Bruce. This was not a mistake, but was a tactical decision done with malice. This Court should affirm the Sholes' strategic decision.

3. The Three-Year Statute of Limitations Period Was Not Tolled By Disability

¶46. The Sholes raise a similar baseless argument that a supposed disability of Russell's tolled their collective claims. First, the Sholes fail to acknowledge that Mary has never been disabled. Thus, even if Russell is incapacitated, the couple's claims ran years ago. (ROA 47.)

¶47. That issue aside, the Sholes have the burden to establish a basis to toll the applicable statute of limitations. *Anson.* To do so, they had to submit **evidence** of Russell's disability. *McCloud*. The Sholes do not even argue that they met their burden because there is no evidence that Russell is mentally disabled. In fact, he signed the Opening Brief in this case and has repeatedly retained counsel to represent him in various lawsuits he filed against Judy. Not one of his lawyers in any of these cases has claimed he is incompetent. (ROA 47.)

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[6] In fact, Bruce (appearing *in propria persona* at the deposition) objected to Judy's line of questioning with a curious statement: "[o]bjection to form, calls for legal conclusion. **Community Property**." (Emphasis added.) (ROA 17, p. 30.) So even Bruce recognized the community nature of the claim.

¶48. An applicable statute of limitations is tolled while an injured party is of "unsound mind." *A.R.S. § 12-502*. "In Arizona, unsound mind occurs when the 'person is unable to manage his affairs or to understand his legal rights or liabilities.'" *Doe v. Roe*, 191 Ariz. 313, ¶ 42, 955 P.2d 951, 964 (1998), *quoting Allen v. Powell's Int'l, Inc.*, 21 Ariz. App. 269, 270, 518 P.2d 588, 589 (1974). In order to carry his burden to establish tolling through unsound mind, the party claiming the tolling "must set forth specific facts – hard evidence – supporting the conclusion of unsound mind." *Id.* "[C]onclusory averments such as assertions that one was unable to manage daily affairs or understand legal rights and liabilities" are insufficient to overcome the important rights vested in defendants that are protected by statutes of limitations. *Id.* In this case, Appellants failed to establish any disability, let alone one that could toll the statute of limitations.

¶49. The Sholes instead attempt to refocus the Court on two circumstances. First, they say that Judy conclusively admits that Russell is incompetent. False. Second, they argue that Russell's medical conditions "impair" his "cognition." So what. The Sholes never submitted an affidavit from anyone, let alone a qualified medical professional, stating Russell's medical condition or setting forth any actual disability. Neither did Appellants specifically set forth a disability that rendered Russell incapable of conducting his daily affairs or of understanding his legal rights. To the contrary, the uncontested evidence shows that Russell maintained

the very claims he raises in the *Clone Complaint* against Judy in the *Maricopa Case* for three and one-half years, during which time the Sholes now allege he was of unsound mind.

¶50. Moreover, Judy's position either one way or the other on this issue is immaterial. However, let's be clear, Judy never said Russell was incompetent. What she said was – if he cannot give a deposition, then he should not be allowed to testify at trial. (ROA 38, pp. 20-26.) In Pima County Case 2006-3454 (the "Oasis Case") Judy successfully prevented Russell from testifying because he had obtained a protective order against having to give his deposition (based on his health, not mental incapacity). (*Id.* at 38-42.) Her request to preclude him from testifying at the Oasis trial was because she was prevented from deposing him due to his physical health, not because he was incompetent. (*Id.* at pp. 20-26.)

¶51. More importantly, the Sholes' failure to support their argument to the trial court with any evidence prior to the time it ruled on the merits waived this argument on appeal. *Childress Buick Co. v. O'Connell*, 198 Ariz. 454, ¶ 26 n. 2, 11 P.3d 413, 418 n. 2 (App. 2000). Despite their unsupported conclusory statements that Russell is of unsound mind, the Sholes failed to present any supporting admissible evidence to the trial court. Their disability claim accordingly fails. *Doe.*

4. No Written Acknowledgement Tolled The Three-Year Statute of Limitations Period

¶52. The Sholes' *Clone Complaint* does not allege the breach of a written contract but only a "verbal agreement." (ROA 2, p. 4, ¶ 19.) Notwithstanding the Sholes' choice of what claims they would bring, they now claim their *Clone Complaint* alleges the breach of a written contract. It does not. Moreover, none of the offers Judy made to settle the *Maricopa Case* are written acknowledgements that could reset the limitations period in this case.

¶53. When an action is barred by limitation, no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the action out of the operation of the law, unless the acknowledgment is in writing and signed by the party to be charged thereby. *A.R.S. § 12-508*. Additionally, the written and signed acknowledgment "must sufficiently identify the obligation . . ., and must contain . . . an expression by the debtor of the 'justness' of the debt." *Bulmer v. Belcher*, 22 Ariz. App. 394, 396, 527 P.2d 1237, 1239 (1975).

¶54. No writing the Sholes point to constituted an actionable written acknowledgment. Judy's 2008 affidavit adamantly denies that she was liable to the Sholes for the debt: "even though I owe them nothing, I offered to pay [the Sholes] every penny asked for in their" *2006 Complaint*. (Emphasis added.)

(ROA 12, p. 28.) The affidavit does not contain any expression of indebtedness, let alone a statement recognizing the "justness" of the debt. *Bulmer*.

¶55. As to the undated facsimile, it is neither signed nor does it identify any specific obligation, let alone acknowledge that the referred-to obligation is "just." Nor is the facsimile admissible under Rule 408, *Ariz. R. Evid*. It also should not be forgotten that the Maricopa County court already rejected the Sholes' attempt to enforce the facsimile as a written settlement agreement. (ROA 6, pp. 73-74.) Thus, neither writing is an actionable acknowledgment. *Bulmer*.

¶56. In fact, the factual background of *Bulmer* highlights a striking, common circumstance here. In *Bulmer*, in-laws loaned their daughter and son-in-law $5,000. 22 Ariz. App. at 395, 572 P.2d at 1238. In an ensuing divorce proceeding between the daughter and her husband, the husband's attorney wrote a letter stating that the son-in-law would continue to make payments to the parents as he had been doing prior to the date the dissolution action was filed. *Id.* The court rejected the parents' argument in a subsequent action that the letter was an actionable written acknowledgment. *Id.* at 397, 527 P.2d at 1240.

¶57. In *Bulmer* there was no allegation of misconduct as to any party's underlying conduct. That is not the case here. Although it is possible that an innocent party could be hurt by the requirements of a written acknowledgment, the rule serves a valid purpose in cases like this where the parties alleging the debt do

so only to serve ulterior purposes. In rejecting the Sholes' arguments, the trial court in this case found that the Sholes came to the Court with unclean hands and that their "conduct and claims have the appearance/inference of parents helping their son in posturing during his divorce proceedings with Judy." (ROA 23, p. 4.) The Sholes are not innocent parties. They filed their *2006 Complaint* merely as an attempt to tie up Judy's sole and separate house so she could not sell it. They did this to apply improper pressure on Judy in the divorce proceeding they knew was coming. The Sholes lost their claims against Judy on the merits because she did not enter into an oral agreement to borrow money from them. Judy never signed a written acknowledgement of the justness of the Sholes' debt because the debt never existed. Thus, this Court should affirm.

VI. APPELLANTS CANNOT OVERCOME THE JURY'S FINDING THAT JUDY IS NOT RESPONSIBLE FOR THE ALLEGED DEBT

¶58. This case and the *Maricopa Case* are virtually identical. As the trial court found:

> If these two cases sound familiar, they are. The only difference is that in the Maricopa County case the Plaintiffs alleged that their agreement was solely with Judy, as her separate obligation. In this case, after having fully litigated to judgment the Maricopa County case and losing, the Sholes now claim that their agreement was with Judy and Bruce.

(Emphasis in original.) (ROA 23, p. 2.)

¶59. At the conclusion of the *Maricopa Case,* the jury returned a verdict that Judy did not breach an oral agreement with the Sholes. (ROA 6, p. 69.) The "fact" of the alleged loan from the Sholes was tried and decided in the *Maricopa Case*. Because the jury found that there was no loan agreement between Judy and the Sholes, the Sholes are precluded from relitigating this fact.

A. RES JUDICATA

¶60. In Arizona, the doctrine of *res judicata* precludes a party from filing a claim "when a former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue between the same parties was, **or might have been, determined** in the former action." *Hall*, 194 Ariz. at 57, 977 P.2d at 779 (Emphasis added.) This rule of law preserves judicial resources, provides finality to parties, and deters harassment of former litigants. *Id.* A party is bound by and may not relitigate any issue decided or any issue that could have been decided in the prior litigation. *Norriega v. Machado*, 179 Ariz. 348, 351, 878 P.2d 1386, 1389 (App. 1994).

¶61. There is no doubt that the jury in the *Maricopa Case* decided that there was no loan agreement between the Sholes and Judy. It is tautological that an essential element of a breach of contract is the existence of a contractual responsibility. The Sholes argued in litigating the *Maricopa Case*, that Judy breached the 2005 loan agreement by failing to repay borrowed money when

it was due. (ROA 6, pp. 14, 17, 19-20.) Judy's defense in the *Maricopa* Case was that Bruce refused to pay back his parents the annuity money he owed them, and that community money (not annuity money) was used to pay off her mortgages. (ROA 12, p. 21.) There is no **evidence** in this record from the *Maricopa Case* of jury questions and no evidence that the jury was asked to determine whether the loan was a community obligation. In the end, the jury returned a simple judgment that Judy was not responsible for the debt. The Sholes acknowledge that they could have at least asked the Maricopa County trial court to pose an interrogatory to the jury, but they failed to do so. (Opening Brief at 33, n. 1.) Because the jury found that the Sholes did not lend money to Judy, the Sholes are forever barred from relitigating that fact. *Norriega*.

¶62. However, that is the same fact that the Sholes seek to relitigate in their *Clone Complaint*. For an action to be barred, it must be based on the same cause of action asserted in the prior proceeding. *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986). Arizona courts apply the "same evidence" test for defining whether the two actions assert the "same cause of action." *Phoenix Newspapers, Inc. v Dep't of Corrections,* 188 Ariz. 237, 240, 934 P.2d 801, 804 (App. 1997).

¶63. Just as in their *Amended 2006 Complaint*, the Sholes' *Clone Complaint* alleges that they negotiated a loan agreement with Judy in or about May

2005. (*Compare* ROA 2, p. 4 ¶¶ 19-20 *with* ROA 6, p. 17 ¶¶ 16-17.) The Sholes' *Clone Complaint* alleges no different facts and asks for identical relief as the claims previously tried in the *Maricopa Case*. Thus, the Sholes' *Clone Complaint* presents the same cause of action raised in the *Maricopa Case*.

¶64. The Sholes acknowledge that *res judicata* precludes a second action regarding every issue that **was decided or could have been decided**, but they still argue that they can relitigate their failed claims from Maricopa County pursuant to *Heinig v. Hudman*, 177 Ariz. 66, 71, 865 P.2d 110, 115 (App.1993). The problem for the Sholes is that the Maricopa County jury **decided** that Judy did not owe the money at all. As such, *res judicata* bars the Sholes' claim. *Id.*

¶65. The Sholes contend that the decision in *Heinig* supports their quest for a second bite at the apple. It does not. In *Heinig*, the issue was whether a wife was bound by an arbitration award taken against her husband. Plaintiff Heinig and the Hudman husband were partners. *Id.* at 68, 865 P.2d at 112. The husband took his interest as a married man dealing with his sole and separate property. *Id.* Heinig wished to refinance the property held by the partnership and the husband blocked the refinancing in an attempt to squeeze out Heinig. *Id.* After the bank foreclosed the partnership's property, Heinig initiated arbitration proceedings against the husband. *Id.* The evidence at the arbitration proceedings showed that the husband had used community funds to purchase his partnership interest, but the arbitrator

denied Heinig's request to add the wife as a party because the arbitration agreement was only executed by Heinig and the husband. Thus, the arbitrator had no authority to require the presence of or add a non-party to the proceedings. *Id.* at 72, 865 P.2d at 114. The arbitrator found the husband liable and entered a net award in favor of Heinig. *Id.* at 68, 865 P.2d at 112. Heinig confirmed the award in the superior court then filed a separate action against the community.

¶66. The first issue the court in *Heinig* addressed was whether the Hudman wife's due process rights were satisfied in the arbitration involving only the husband. *Id.* at 70, 865 P.2d at 112. The Due Process Clause requires that every person have notice of a claim and a meaningful opportunity to be heard before being deprived of property. *Id.* In the arbitration proceedings, however, the court found that "the record [was] clear that [the wife] was never a party to the arbitration." *Id.* at 70, 865 P.2d at 114. Thus, the *Heinig* court noted, the only way Heinig could obtain a judgment against the community was to allow the wife to defend the community claim.

¶67. Although Judy has found no case discussing a plaintiff's due process rights under similar facts, it is clear that what due process rights the Sholes have were honored. The Sholes had an opportunity to file a claim against Judy's community and they were on notice of the need to do so. In the *Maricopa Case,* the Sholes in fact filed an action against both members of Judy's community

alleging that Judy was married at the time of the alleged contract between her and the Sholes. But instead of bringing their claim as a community claim, **they purposefully and intentionally** brought their claim only against Judy. The trial court found that the Sholes's purpose in limiting their claims was merely a transparent attempt to benefit their son in his divorce case against Judy. If the Sholes' due process rights were implicated by their own filing, they were protected.

¶68. The second issue in *Heinig* was whether application of the doctrine of *res judicata* precluded the second action Heinig filed against the Hudman community. The court found that it did not, based on the two exceptions to the doctrine contained in Restatement (Second) of Judgments § 26 (1)(b) and (c) (1982). Neither of these exceptions are applicable here.

¶69. Although the *Heinig* court allowed the plaintiff to file her claim a second time, it did so because her first judgment bound only one member of the community. Unlike in *Heinig*, however, the Sholes here **failed** to obtain a judgment against Judy in the first action. This fact is fatal to the Sholes' reliance on *Heinig.*

¶70. Moreover, the *Maricopa Case* trial court did not expressly reserve the Sholes' right to maintain a second action against Judy's community pursuant to Restatement (Second) of Judgments § 26 (1)(b), as the Sholes claim. The

comments of the *Maricopa Case* trial court regarding future community liability referred to the divorce court deciding how the debt would be classified **IF** Judy was found liable. (ROA 20, pp. 15-22.) The fact that she was found **NOT** to be liable for the alleged debt, makes the trial court's comments about this issue meaningless and the Sholes claim regarding this frivolous.

¶71. The fact is the judgment in the *Maricopa Case* does not carve out the possibility that Judy's community could still be liable. Neither did the judgment carve out an exception as to possible future liability of Bruce's and Judy's community as did the arbitration award in *Heinig*. As such, the Restatement (Second) of Judgments § 26 (1)(b) does not provide the Sholes with any relief.

¶72. Additionally, the Sholes claim that because they were "unable … to seek a certain remedy or form of relief in [the *Maricopa Case*] because of limitations on the subject matter jurisdiction of the courts" they are entitled to a second bite of the apple pursuant to Restatement (Second) of Judgments § 26 (1)(c). This claim is meritless. The Sholes were never prevented from timely seeking a remedy or form of relief against Judy. They simply lost the one they chose to pursue and now want to keep eating the apple. However, they only get one bite and they already had it.

¶73. The Sholes were not "unable … to seek a certain remedy or form of relief" because their belated attempt to amend their *2006 Complaint* for the second

time was denied three days before trial. They had a remedy and form of relief against Judy. They lost. The reason their second attempt to amend their *2006 Complaint* was denied was because they waited too long to try and change the theory of their case, Judy would have been prejudiced by their amendment and their proposed amendment directly contradicted their own testimony.

¶74. At the hearing on the Sholes' motion – a hearing held just three days before trial started – Judy argued that allowing such a late amendment would severely prejudice her. (ROA 20.) During the hearing, Judy pointed out that the Sholes had known about her defense since day one. (*Id*.) She also noted that Mary Sholes testified under oath that her son, Bruce, did not have to pay her back because he "doesn't owe… anything…[t]his is Judy's debt." (ROA 17, pp. 29-30.) The Court precluded the Sholes from pleading a new theory contradicting Mary's sworn testimony. Less than one week later, the jury returned verdicts rejecting ALL the Sholes' claims – which are the same claims they are trying to relitigate. (ROA 20, pp. 11-12.) Not only did the Maricopa County trial court agree that the prejudice to Judy could not be overcome, but the Sholes did not appeal from that ruling and allowed the judgment entered against them in the *Maricopa Case* litigation to become final. (ROA 6, pp. 73-74.)

¶75. Moreover, the Sholes' claim that they did not learn of Judy's defense in the *Maricopa* Case until shortly before trial is absolutely false. The Sholes had

all the notice that one could possibly need to raise a community claim: they knew that Judy was married to their son; they named their son in the lawsuit specifically carving out the claim against Judy as sole and separate; Judy provided them with her Initial Disclosure Statement and Affidavit saying community funds and not the Sholes' annuity funds were used to pay off her Scottsdale House mortgages (affirmed when the jury found that it was not the Sholes' money that paid the mortgages); and Judy filed a MSJ arguing that she did not owe the Sholes any money. (ROA 12, pp. 25-29; ROA 17, pp. 16-26, 32-57. (S*ee also* ROA 17, pp. 59-61 (the Sholes' motion to amend (for the second time) the *2006 Complaint* filed just three weeks before trial acknowledging that Judy "has defended the action, in part, on the basis that [Bruce] borrowed the money and failed to pay it back.").) Nonetheless, despite the various constructive and specific notices provided, the Sholes continued to insist that they had reached an agreement only with Judy, a fact that the jury considered and found against the Sholes no matter what interpretation one makes of the verdict. (ROA 17, pp. 28-30.) Thus, the Restatement (Second) of Judgments § 26 (1)(c) does not provide the Sholes with relief.

¶76. Next, the Sholes' argument that paragraphs (a) and (f) of the Restatement (Second) of Judgments § 26 (1) offers them relief from the rule of preclusion is also meritless. First, the Sholes waived this argument by failing to

present it to the trial court. *See Childress Buick Co.*, 198 Ariz. at 459, ¶ 26 n.2, 11 P.3d at 418 n.2. Furthermore, even if it was not waived, it has no merit. Judy defended the Sholes' sham claims in the *Maricopa* Case and did not acquiesce to any substantial position the Sholes took. Judy did not agree "in effect" or by "acquiescence" that the Sholes could split their claims. Therefore, the Restatement (Second) of Judgments § 26 (1)(a) is inapplicable to this case.

¶77. Finally, the Sholes' argument that *res judicata* does not apply because pursuant to Restatement (Second) of Judgments § 26 (1)(f) there was no "coherent disposition" of the controversy is of no moment. The Sholes pleaded three times - in their *2006 Complaint,* in their *Amended 2006 Complaint*, and in their *Clone Complaint* - that the only oral contract that ever existed was between them and Judy. (ROA 2; ROA 6, pp. 14-42.) The judgment in the *Maricopa Case* is *res judicata* that no such agreement exists. *Norriega*. What the Sholes ask this Court to consider, then, is whether they can manufacture an ambiguity out of whole cloth after the pleadings are filed, while ignoring the allegations actually alleged in their *Clone Complaint* and the fact that those allegations were already rejected on the merits by a jury sitting as a neutral fact-finder. The problem is not a lack of coherence in relation to the unappealed final judgment; the problem is a lack of candor by the Sholes. More importantly, as previously stated the Sholes waived

this argument by failing to present it to the trial court. *See Childress Buick Co.*, 198 Ariz. At 459, ¶ 26 n.2, 11 P.3d at 418 n.2.

¶78. Here, because the jury could have determined and did in fact determine that Judy did not contract with the Sholes at all, the jury's verdict in favor of Judy carries over into this litigation and bars the Sholes from relitigating that fact. *Hall*. Thus, the Sholes' *Clone Complaint* is also barred by *res judicata*.

B. COLLATERAL ESTOPPEL

¶79. The doctrine of collateral estoppel compels the same result. Once an issue is actually litigated and determined by a valid and final judgment on the merits in a court of competent jurisdiction, that essential determination is binding in subsequent suits. *Corbett v. ManorCare of America, Inc.*, 213 Ariz. 618, 624, 146 P.3d 1027, 1033 (App. 2006). Unlike with the *res judicata* doctrine, an issue must have been actually raised and litigated to be precluded by collateral estoppel; redetermination of issues are only permitted if there is reason to doubt the quality, extensiveness, or fairness of the prior determination of the issues. *Id.* at 625-26, 146 P.2d at 1034-35. Such circumstances include, for example, a change of law between the two trials.

¶80. It is hornbook law that a debt incurred during marriage is a community's obligation if the intent or purpose of the spouse who incurred the debt was to benefit the community. *See In re Rollinson*, 322 B.R. 879, 881 (Bankr.

D. Ariz. 2005). If the debt is a community debt, any issue surrounding the debt that is fully litigated and decided against one party should be preclusive to relitigating that same issue in a later action.

¶81. Here, the issue the Sholes raise in their *Clone Complaint* is the same issue determined in the *Maricopa Case*: whether Judy orally contracted with the Sholes to borrow money. On December 9, 2009, the jury in the Maricopa County action found in favor of Judy on the Sholes' breach of contract, promissory estoppel, and unjust enrichment claims. (ROA 6, pp. 58-71.) The jury's decision and the court's resulting final judgment on the merits are binding on the parties. (*Id.* at pp. 73-74.) Thus, Judy cannot be obligated to the Sholes for an alleged oral debt arising out of these circumstances.

¶82. The Sholes attempt to avoid issue preclusion by filing against Judy's marital community instead of against her only in her individual capacity. This will not spare them from the preclusive effect of collateral estoppel. Judy was married at the time the alleged loan was made and, in fact, the Sholes named Bruce as a co-defendant because of any interest he might claim in Judy's sole and separate property. (ROA 6, pp. 16, ¶ 14 and p. 31, ¶ 13.) A lawsuit (such as the *Maricopa Case*) that names both spouses has the ability to bind both spouses. *Eng v. Stein*, 123 Ariz. 343, 346, 599 P.2d 796, 799 (1979); *Vikse v. Johnson*, 137 Ariz. 528, 530, 672 P.2d 193, 195 (App. 1983); *A.R.S. § 25-215(D)*. Further, Judy repeatedly

claimed throughout the *Maricopa Case* that she did not borrow any money from the Sholes.

¶83. Judy prevailed on this issue when the jury rejected the Sholes' claims. The jury's determination that Judy did not owe the Sholes for breach of an oral agreement precludes that issue and any related issues from being relitigated against her in either her sole and separate or marital capacity. Overarching notions of fairness and justice such as those embodied by the doctrine of collateral estoppel can only be honored if this Court precludes the Sholes from relitigating an essential issue that has already been determined within the final and valid Maricopa County judgment. Again, the Court should affirm the trial court's dismissal of the Sholes' *Clone Complaint*.

VII. THE COURT SHOULD AWARD JUDY HER REASONABLE ATTORNEY'S FEES

¶84. This matter arises out of an alleged contract. Attorney fees are appropriate in this case regardless of whether this Court determines that the contract the Sholes allege did not exist (based on the jury's verdict in the *Maricopa Case*) or whether the Sholes are simply barred from bring their claim. *See Colberg v. Rellinger*, 160 Ariz. 42, 51, 770 P.2d 346, 355 (App. 1988) (matter arises out of contract despite determination that no valid contract existed). The trial court felt it was appropriate under the circumstances of this case to award Judy her attorney's fees. This Court should do the same. As such, the Court should award Judy her

attorney's fees upon her compliance with Rule 21, *Ariz. R. Civ. App. P. See also A.R.S. § 12-341.01*.

¶85. Additionally, parties are prohibited from filing frivolous actions both in the Superior Court and in this Court.[7] *Ariz. R. Civ. P. 11; Ariz. R. Civ. App. P. 25*. This Court utilizes an objective test to determine whether an appeal is frivolous: "If the issues raised are supportable by any reasonable legal theory, or if a colorable legal argument is presented about which reasonable attorneys could differ, the argument is not objectively frivolous." *Matter of Levine,* 174 Ariz. 146, 153, 847 P.2d 1093, 1100 (1993) (citations omitted.). In imposing sanctions pursuant to Rule 25, this Court has analogized an appellant's duties to the duty imposed by E.R. 3.1 to avoid asserting claims for which there is no justification. *Johnson v. Brimlow*, 164 Ariz. 218, 222, 791 P.2d 1101, 1105 (App. 1990).

¶86. The Sholes have not presented any reasonable legal theory or colorable legal claim for relief. As the trial court found, the Sholes filed their original action with the intent of using it to leverage a better result for their son in his ongoing divorce with Judy. Unfortunately for the Sholes, that strategy collapsed when the Maricopa County jury found that Judy was not liable for their

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[7] In denying Judy's request for sanctions against the Sholes for filing a frivolous complaint pursuant to Rule 11, *Ariz.R.Civ.P.*, the trial court found the Sholes position regarding the application of the statute of limitations was meritless, but denied Judy's request because the Sholes' had " a 'fingernail' grasp on a good faith argument for tolling." (ROA 23, p.5.) The Sholes lost their "fingernail" grasp with this Appeal.

claimed oral agreement. But the Sholes simply tried to disregard that jury verdict and still assert the same pressure. In attempting to assert this pressure, the Sholes affirmatively misrepresent the holdings of multiple cases and continue to make up facts that do not exist. The Sholes fail to raise any supportable factual or legal theory requiring reversal of the trial court's decision. For all these reasons, this Court should award Judy her reasonable attorney's fees incurred in responding to this frivolous appeal pursuant to Rule 25, *Ariz. R. Civ. App. P.*

VIII. CONCLUSION

¶87. The trial court was correct: the Sholes filed the *Maricopa Case* and their *Clone Complaint* simply to apply improper pressure on Judy in her divorce case. Because the Sholes waited too long to bring their *Clone Complaint* and because the Maricopa County jury's verdict against the Sholes on identical allegations eviscerates any oral contract-based cause of action the Sholes could possibly file, this Court should award Judy her reasonable attorney's fees and affirm the trial court's judgment.

DATED: August 5, 2011.

MESCH, CLARK & ROTHSCHILD

/s/ Michael J. Crawford
Michael J. Crawford
Paul A. Loucks
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(b), A.R.C.P., I certify Appellee's Answering Brief is proportionately and double spaced, has a Times New Roman typeface, with a font size of 14, and the main text contains 9,432 words.

DATED: August 5, 2011.

/s/ Michael J. Crawford
Michael J. Crawford

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

Michael J. Crawford, upon his oath, states that he made service of Appellees' Answering Brief by electronic filing the same on August 5, 2011, with the Clerk, Court of Appeals, Division Two, and mailing AND e-mailing this same date to:

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/s/ Michael J. Crawford
Michael J. Crawford

SUBSCRIBED AND SWORN to before me on August 5, 2011 by Michael J. Crawford.

/s/ Susan P. Billock
Notary Public

My Commission Expires:

January 7, 2015

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